No. [illegible]

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Southern Arizona York Refrigeration Company, et al.,

Appellants,

vs.

The Bush Manufacturing Co., et al.,

Appellees.

On Appeal From the District Court of the United States Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANTS.

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FILED

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vs.

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Appellee.

On Appeal From the District Court of the United States Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANTS.

I.

Statement of Jurisdiction.

The federal jurisdiction of this Court is invoked upon the ground of diversity of citizenship under Title 28 U. S. C. Section 1332 in that plaintiffs are corporations organized under the laws of the State of Arizona and have their principal place of business in said State, and that the defendant is a corporation organized under the laws of the State of Connecticut with its principal place of business in said State, and it also has a plant and business office in the County of Riverside, State of California, and is doing business within the territory and area embraced by the Federal District Court of Southern California, Central Division; that plaintiffs have alleged their damages to be in excess of $10,000.00 exclusive of costs and interests.

II.

Statement of the Case.

The present case is not entirely new to this Court. This Court has heard some of the prior history of the present case and its previous decisions anent certain portions of the case are to be found in: *Authorized Supply Company of Arizona, a corporation, appellant, v. Swift & Company, a corporation, et al., appellees,* and *Arizona York Refrigeration Company, a corporation, et al, appellant, v. Swift & Company, a corporation, appellee,* 271 F. 2d 242 (1960), Ninth Circuit, rehearing 277 F. 2d 710 (1960) Ninth Circuit.

All relevant facts of the case may be found in the Stipulation of Facts of the pretrial order, and Findings of Fact in the District Court. On or about May 31, 1955, plaintiffs made a written contract with Swift & Company, an Illinois corporation in the City of Tucson, State of Arizona. Plaintiffs' contract with the aforesaid Swift & Company was to install refrigeration equipment in Swift & Company's building in said city.

The terms of the written contract, among other things, required the furnishing and installation of two refrigeration coils. In order to perform the contract of installation, two Model EDA 240 electric ammonia refrigeration coils, which had been manufactured and designed by the defendant, were purchased from the Authorized Supply Company of Arizona, an Arizona corporation.

Under the terms of the written contract, made between plaintiffs and Swift & Company, the coils were installed by plaintiffs in Swift & Company's building.

Installation was completed about September 5, 1955, and at that time, the system was tested and worked satisfactorily for a period of time thereafter of approximately one to two months.

Prior to the startup and operation of the refrigeration system, said coils were tested by the plaintiffs and were found to be satisfactory and without any leaks whatsoever. Approximately one to two months after the installation of said equipment, a leak developed in the south coil which caused no damage to any of the refrigerated products. The West-Coast representative of the defendant, one Oliver Butler, instructed plaintiffs' maintenance engineer how to repair the leak. Said leak was repaired upon instruction from the aforesaid Butler by removing the heater element (electrode) from its innertube where the leak was discovered and welding closed said innertube at the end.

A short time later, two more leaks developed, one in the north refrigeration coil and one in the south refrigeration coil. Each of these leaks was repaired under the instruction of defendant by removing the heater element and welding closed the innertube in which the heater element was placed. The cost of the repairs to the three leaks were paid for by plaintiffs, but they were reimbursed by the defendant.

On the weekend of December 3 and 4, 1955, another leak developed in one of the coils, permitting ammonia gas to escape into Swift & Company's storage area and as a proximate result thereof, meat and other products were damaged in the sum of $9,175.29. On or about December 27 or 28, 1955, defendant through its distributor in Arizona, the Authorized Supply Company, at no cost to plaintiffs, replaced the defective coils

with new Bush coils of an improved design. The said new coils, installed by plaintiffs in said plant, performed satisfactorily.

Thereafter, on October 19, 1956, Swift & Company filed a law suit in the United States District Court of the District of Arizona, naming as parties defendant in said law suit, plaintiffs, the Authorized Supply Company, an Arizona corporation, and defendant.

At the time of the filing of the law suit, and at the time that plaintiffs were served as party defendants in that action, plaintiffs called upon defendant herein to take over the defense of the law suit and to pay any damages sustained by Swift & Company as a proximate result of the coil leaks, and at that time and at all times subsequent thereto, defendant refused and has refused to do so.

On February 18, 1957, plaintiffs filed a third party law suit, naming as defendants, the defendant herein and the Authorized Supply Company. Said suit was filed in the United States District Court of Arizona. Thereafter, said Court found that it had no jurisdiction over defendant herein by reason of the fact that it (defendant herein) was not doing business in Arizona. That law suit was dismissed by the Court as to third party defendant and defendant herein on the above mentioned basis.

Subsequently, plaintiffs herein were found liable to Swift & Company for the damage to its meat on the basis of the breach of an expressed warranty to furnish merchantable goods.

The Authorized Supply Company was found not liable to plaintiffs on the ground that plaintiffs had

elected to rescind its contract for the sale of goods under the Arizona sales act with the aforesaid Authorized Supply Company, and having thus elected, under an Arizona interpretation of the sales act, had chosen an exclusive remedy for damage in the purchase of goods limiting liability to the replacement of the goods sold as against the Authorized Supply Company.

On July 29, 1960, plaintiffs paid in full said judgment of $9,175.29. Plaintiffs also paid in the defense of said law suit and the appeals thereof, attorneys fees and costs in the amount of $5,060.12.

Plaintiffs filed the present suit in Federal District Court, Southern California, Central Division, against defendant on July 1, 1961. Shortly thereafter, defendant made a motion for Summary Judgment on the grounds (1) that the Statute of Limitations had run; and (2) that plaintiffs had not stated a cause of action in equitable indemnity. Said judgment was denied on both grounds by the Honorable Fred Kunzel, District Judge, to whom the case at that time had been assigned for trial. The case thereafter was transferred for trial to the Honorable Albert Lee Stephens, Jr., before whom it was pretried and at which time plaintiffs waived their right to a jury trial. At a later date, the case was transferred to the Honorable Jesse W. Curtis for trial.

The case was tried on February 12, 1961, and evidence was offered by plaintiffs in the form of testimony by one Leland Gideon, service manager for Arizona York, who stated that, in his opinion, the leak in the coils furnished by defendant was caused by air getting between the electrode (heater element) and the innertube in which it was housed, condensing into mois-

ture during the refrigeration process, later freezing and expanding, and over a period of time cracking the innertube to cause a leak by reason of said expansion. He also testified that the coil with which the old coils were replaced, was changed in that "where the electrode goes in, it has a nut around the electrode that tightens and seals the electrode in that tube from the atmosphere in the room." [Tr. p. 29, lines 8-11; p. 44, line 10, to p. 45, line 18.]

Morris Gerhard, refrigeration welder, gave his opinion that "the leak was caused by expansion and contraction of the innertube at its connection with the suction header, causing it to leak." [Tr. p. 65, lines 17-20.]

The West Coast representative of defendant corporation at the time of the occurrence, one Oliver Butler, testified under Rule 43(b) of the Federal Rules of Civil Procedure, that "the leak could have been caused by condensation of moisture which froze and expanded in the innertube, or by the cold juncture on the heater element having been placed inside the innertube." [Tr. p. 122, lines 24-29.]

Mr. Allan Decker, Vice-President in charge of engineering of defendant, testifying under Rule 43(b) of the Federal Rules of Civil Procedure, very reluctantly admitted that "an unsealed innertube with a heater element could allow moisture to condense and upon freezing expand and cause a crack in the innertube." He also testified that "arcing at the cold juncture in the heater element having been placed inside the innertube, could have caused trouble," [Tr. pp. 95, 96] but he could give no explanation as to how the leak in the coil installed by plaintiffs occurred. [Tr. pp. 90-119.]

Dr. Morelli testified that "there could be a crack or a slit in a well (innertube) due to the differential in the coefficient of expansion of the inner and outer tube over a period of time." [Tr. p. 143, lines 12-18.]

Defendant's Exhibit B (a Dunham & Bush catalog, 1959 they could furnish no 1955 catalog), on page 32 showing a picture of an improved ED electric defrost coil, which counsel for defendant stated [Tr. p. 15, line 19] was already in evidence, a statement which counsel for plaintiffs accepted, reads "Close up view of mechanical sealing of heater element", and also "Mechanical sealing of heating elements provide positive protection against entry of any moisture into the innertube system".

At the conclusion of plaintiffs' case, the Court granted a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure on the basis that plaintiffs had not established a prima facie case of negligence against defendant.

III.

Specification of Error.

The District Court erred in granting the dismissal with prejudice at the conclusion of plaintiffs' evidence (1) on the basis of the fact that defendant, as a matter of law, was estopped to deny that the refrigeration coils, furnished by defendant, were defective when furnished; (2) under the doctrine of *res ipsa loquitur,* an inference of negligence was raised against defendant for having furnished the defective refrigeration coils, and (3) said inference was not overcome by defendant who offered no evidence by way of explanation of the

defective coils, and (4) even without collateral estoppel under the doctrine of equitable indemnification, the factual situation presented by plaintiffs, was such that the doctrine of *res ipsa loquitur* placed the burden on defendant of at least offering evidence to overcome the inference of negligence raised by the stipulated facts and plaintiffs' evidence.

IV.

Summary of Argument.

1. Collateral estopepl and *Res Judicata* estop defendant from denying it furnished defective coils.

2. *Res Ipsa Loquitur* is a doctrine of evidence and not of substantive law.

3. Requisite fact situation for application of doctrine of *Res Ipsa Loquitur* embraces three conditions.

4. Second condition met if instrumentality under control of defendant at time of alleged negligent act.

5. Present factual situation is the kind in which doctrine of *Res Ipsa Loquitur* should apply.

6. Plaintiff not deprived of doctrine by the introduction of evidence tending to show specific acts of negligence on the part of defendant.

7. In considering a motion for a non suit, all evidence must be considered true and all inferences and doubtful questions must be construed favorable to plaintiff.

8. Plaintiff established prima facie case under doctrine of *Res Ipsa Loquitur* and judgment should be reversed.

V.

Argument.

1. The Doctrine of Collateral Estoppel and Res Judicata Estop Defendant From Denying It Furnished Defective Coils.

Where the indemnitor is notified of pendency of an action against the indemnitee in reference to the subject matter of the indemnity and is given an opportunity to defend such action, and the judgment in such action is obtained without fraud, it is conclusive on the indemnitor as to all questions determined therein which are material to a recovery against him in an action for indemnity brought by the indemnitee, *Lamb v. Belt Casualty Company,* 3 Cal. App. 624, 40 P. 2d 311; *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110 citing Corpus Juris; *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617; 42 Corpus Juris Secundum, Negligence, Section 32, page 614.

As is stated in *West Jersey and SSR Company v. Atlantic City Electric Company,* 107 New Jersey Equity 457, 153 Atl. 254; 42 C. J. S., page 614. Prior judgment against the indemnitee is conclusive against indemnitor whether suit for indemnity is in equity or at law.

Thus, in the case of *Swift & Company v. Arizona York, et al.,* 271 F. 2d 242 (1960) defendant refused to take over the defense of plaintiffs after having been requested to do so and the Court found as a fact that the proximate cause of the damages to Swift & Company were the defective coils furnished by defendant.

2. Res Ipsa Loquitur Is a Doctrine of Evidence and Not of Substantive Law.

The doctrine of *Res Ipsa Loquitur* is one of evidence and not of substantive law. It consequently should be governed by the law of the forum. *Dorswitt v. Wilson* (1942), 51 Cal. App. 2d 623, 125 P. 2d 626; *Pacific Tel. & Tel. Company v. Lodi,* 58 Cal. App. 2d 888, 137 P. 2d 847, 65 Corpus Juris Secundum, Section 220(3), page 993.

However, there is no problem of conflict of law raised here in that the factual situation in the present case presents a proper case for the application of the doctrine of *Res Ipsa Loquitur* in both Connecticut, the state where the refrigeration coils were manufactured and designed, and California, the state of the forum. *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90 (1933).

3. The Requisite Fact Situation for Application of Doctrine of Res Ipsa Loquitur Embraces Three Conditions.

In the early 19th century, the case of *Scott v. London Docks Company,* 3 H & C 596, 601 reprint 665; 65 Corpus Juris Secundum Section 220 (3) at page 993, three conditions that have been quoted wherever the doctrine of *Res Ipsa Loquitur* has been applied, were originally cited. These were

> "(1) the accident must be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff".

These conditions are cited in both California and Connecticut. *Ybarra v. Stangard,* 25 Cal. 2d 486 at p. 489, 154 P. 2d 687 at 689, 162 A. L. R. 1258, *Schiesel v. Poli Realty Company,* 108 Conn. 115 at 121, 142 Atl. 812 at 814.

From the evidence and stipulations in the present case, it would seem that the evidence is sufficient to meet the requirements of conditions 1 and 3. Any questions which might be raised would have to do with the requirement of condition 2, the exclusive control of defendant over the instrumentality causing the accident.

4. Second Condition Met if Instrumentality Under Control of Defendant at Time of Alleged Negligent Act.

In 65 Corpus Juris Secundum at page 1011, Negligence, Section 220 (8) it is stated that

> "According to some authorities in order to invoke the doctrine (Res Ipsa Loquitur), it must appear that the injuring agency was under the control or management of the defendant at the time of the accident, however, it has been held that there is nothing in the reason for the rule or the principles on which it is founded to support the contention that its application is so limited. The defendant's control need not have obtained for any length of time and under some circumstances, it is sufficient if it appears that the injuring agency was in the control of the defendant at the time of the negligent act which caused the injury, although not in his control at the time of the accident provided plaintiff first proves that the condition of the instrumentality had not changed after it left defendant's possession".

This application of the doctrine has been followed widely and is the law in both California, *Dimare v. Cresci,* 23 Cal. Rptr. 772, 373 F. 2d 860, and Connecticut, *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90. In the latter case, certain explosives were manufactured in Connecticut, shipped to Tennessee and during the course of operations there, the explosives went off prematurely injuring a person. The Court found that the doctrine of *Res Ipsa Loquitur* applied by reason of the fact that if there had been any negligence, it must have been during the course of manufacturing of the explosives. If it had been manufactured properly, it could not have gone off prematurely.

5. Present Factual Situation Is the Kind in Which Doctrine of Res Ipsa Loquitur Should Apply.

It would seem that if, at the time the negligence occurred, the instrumentality was in the exclusive control of the defendant, the second condition historically voiced in *Scott v. London Docks Company,* and reiterated in the cases quoted above, would be met, for, as is stated in *Jump v. Ensign-Bickford*

> "It is true that at the time of the accident, the fuse was in the possession and control of the plaintiff, and the second condition we have stated is not literally fulfilled but the purpose of that condition is to exclude the possibility of an intervening act of plaintiff or a third party which causes or contributes to produce the accident and it undoubtedly states the necessary precautions for a sound application of the rule in most cases. In the case at bar, however, . . . evidence that nothing physically could be done to the fuse after it left the defendant's factory to cause it to burn as rapidly as it did, would serve to obviate, in this case, the need for that precaution".

Thus, in the present case, the fact that the coils were installed and operated for a month in a proper fashion and that the defect, when discovered, was inside the coil and had not been touched and not been "acted upon by any outside force since the time of the manufacture." would seem to obviate the need for the precaution of the second condition of *Res Ipsa Loquitur* quoted above.

The doctrine of *Res Ipsa Loquitur* is a rule of evidence peculiar to the law of negligence which recognizes that *prima facie* negligence may be established without direct proof and furnishes a substitute for specific proof of negligence. The doctrine is in part predicated on and requires that the defendant have superior knowledge or means of knowing the cause of the accident. *Doke v. Pacific Crane & Rigging Company,* 80 Cal. App. 2d 601, 182 P. 2d 284; *Kenney v. Antoinette,* 211 Cal. 336, 295 Pac. 341; *Armstrong v. Pacific Greyhound Line,* 168 P. 2d 457, 74 Cal. App. 2d 367; *Finn v. American Bus Line,* 456 Ariz. 567, 110 P. 2d 227.

> "The doctrine of Res Ipsa Loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible".
>
> *Dimare v. Soberanes,* 56 Cal. 2d 466, 14 Cal. Rptr. 545, 363 P. 2d 593;
>
> *Guerra v. Handlery Hotels, Inc.,* 53 Cal. 2d 266, 271, 1 Cal. Rptr. 330, 347 P. 2d 674;
>
> *Zentz v. Coca Cola Bottling Company,* 39 Cal. 2d 436 at 446, 247 P. 2d 344.

"On the basis of the existence of such probabilities, the doctrine has been applied where the defendant was responsible for construction, maintenance or inspection of the defective premises which caused the injury"

Dimare v. Cresci, 23 Cal. Rptr. 772 at 776, 373 P. 2d 860.

In the case at hand, the defendant was certainly in a superior position to determine the cause of the leaks in the refrigerator coil. It was in complete control at the time of the design and manufacture of the coils.

6. Plaintiff Is Not Deprived of the Doctrine of Res Ipsa Loquitur by the Introduction of Evidence Tending to Show Specific Acts of Negligence on the Part of Defendant.

It is stated

"The introduction of evidence of specific acts of negligence does not deprive the plaintiff of the benefit of the doctrine unless the facts as to the cause of the accident and the care exercised by defendant are shown as a matter of law, thus eliminating any justification for resort to the inference of negligence." *Borkenkraut v. Witten,* 56 Cal. 2d 538, 548, 15 Cal. Rptr. 630, 364 P. 2d 467; *Leet v. Union Pacific Railroad Company,* 25 Cal. 2d 605, 620-622, 155 P. 2d 42, 158 A. L. R. 1008: See Prosser on Torts, Second Edition 1955, page 214.

As is stated in 65 Corpus Juris Secundum, Negligence, Section 220(6) at page 1004

"Plaintiff is not deprived of the benefit of the doctrine from the mere introduction of evidence

which does not clearly establish the fact or leaves the matter doubtful, for if the case is a proper one for the application of the doctrine and if under the rules discussed, it should be invoked, an unsuccessful attempt on the part of the plaintiff to show a specific negligent act which caused the damage, does not weaken or displace the inference of negligence on the part of the defendant arising from the facts of the case by virtue of the rules of Res Ipsa Loquitur." *Strock v. Pickwick Stages System,* 107 Cal. App. 298, 290 Pac. 482 and cases cited previously.

In the present case, the plaintiffs have shown that the instrumentality which was the direct and proximate cause of the damages sustained by plaintiffs, was designed and manufactured by defendant, was furnished by defendant, was installed by plaintiffs, operated for one month. When defects arose approximately one month after operation, they were in a portion of the manufactured coil (the refrigeration coil) which had not come in contact with any outside force. It operated properly for a month and then became defective.

The instrumentality was exclusively under the control of defendant at the time any alleged negligence in design and manufacture of the aforesaid instrumentality occurred.

As a consequence thereof, it would seem that the doctrine of *Res Ipsa Loquitur* applied in this factual situation according to the cases cited above, raises an inference of negligence on the defendant which would require proof or explanation as to what caused the leak in the instrumentality after it had been installed in Swift & Company's plant.

The fact that plaintiffs tried to show specific acts of negligence in the design, in no way excused the defendant from making a proper explanation as to the exact cause of the leak in the instrumentality.

Defendant most assuredly did not explain why or how it occurred, for as is stated in the case of *Jump v. Ensign-Bickford Company,* cited previously:

> "Experience has demonstrated that when certain facts are proven ordinarily a certain inference follows and that in the absence of their explanation or rebuttal, reliance may be placed upon the probative strength of the inference to permit a presumption of law attaching to it, certain legal consequences will arise. The presumption is neither the fact nor the inference, but as Thayer says 'The legal consequences of it.' "

7. In Considering a Motion for a Nonsuit, All Evidence Must Be Considered True and All Inferences and Doubtful Questions Must Be Construed Favorable to Plaintiff.

The law of the State of California, the state of the forum, states "Where a judgment is rendered upon a motion for a non suit (the equivalent of a dismissal under Section 41(b) of the Federal Rules of Civil Procedure), the Court must assume that all evidence received in favor of the plaintiff relevant to the issues, is true and all inferences and doubtful questions must be construed most favorable to plaintiff" *Hinds v. Wheadon,* 19 Cal. 2d 458 at 460, 121 Pac. 724 at 725.

VI.

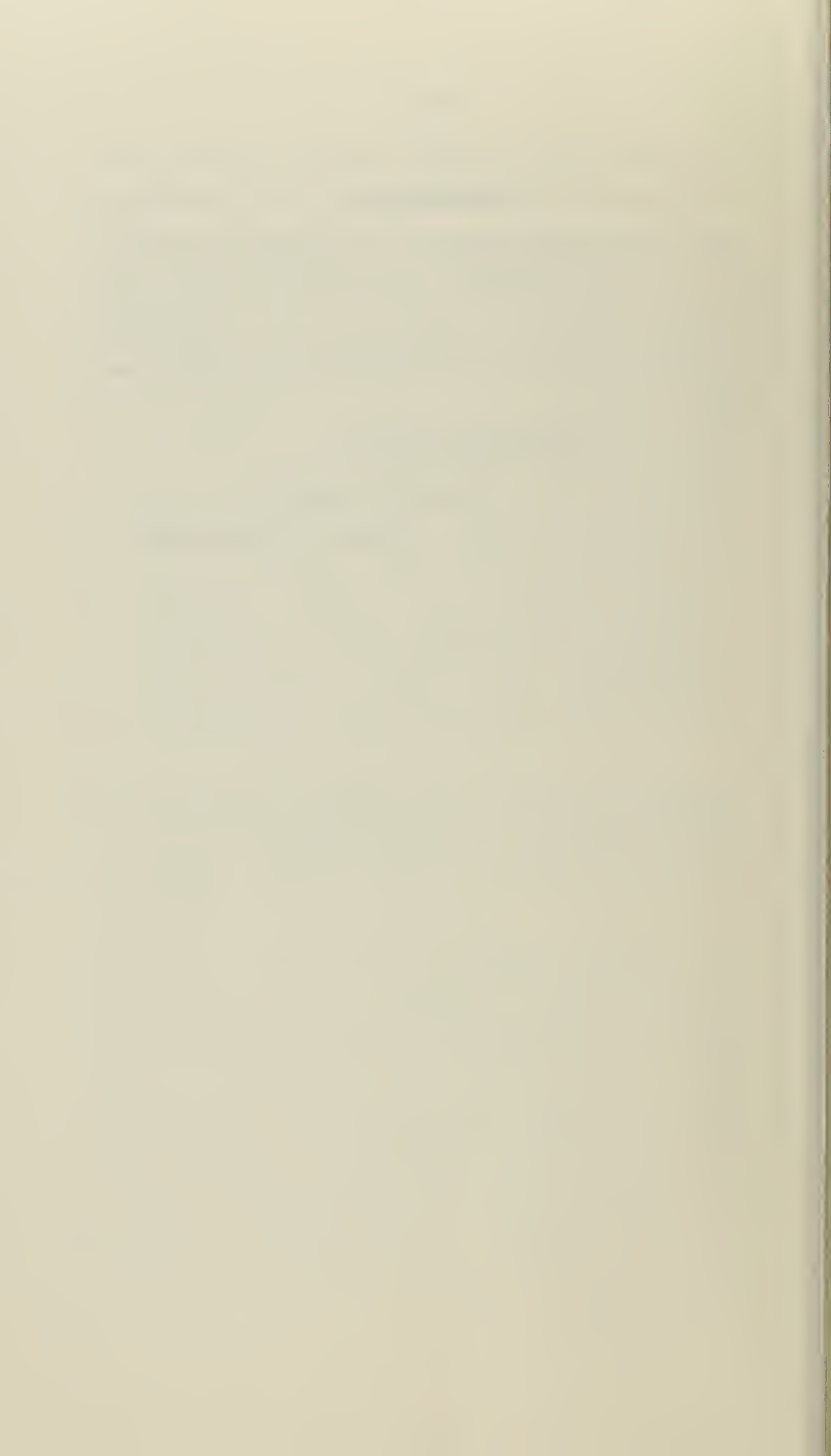
Conclusion.

It is respectfully submitted that applying the law to this case under the doctrine of *Res Ipsa Loquitur,* the plaintiffs established a *prima facie* case of negligence as against defendant and the judgment should be reversed.

Respectfully submitted,

John W. Moran,

Attorney for Appellants.



Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John W. Moran

Sept. 10, 1963.